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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

No. 538

MY STORE, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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NATIONAL LABOR RELATIONS BOARD,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner, My Store, Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case (its case No. 14,770) on July 6, 1965.

CITATIONS TO OPINIONS BELOW.

The judgment of the United States Court of Appeals for the Seventh Circuit is reported at 345 F. 2d 494 (7th Circ., 1965) and is printed in the Appendix[1] at pages 19-24. The final order of respondent, the NATIONAL LABOR RELATIONS BOARD, is reported at 147 NLRB 145 (1964) and

1. The Appendix to this petition is cited herein as "Appx.". The Joint Appendix in the court below is cited herein as "J. A."

is also printed in the appendix hereto. (Trial Examiner's Intermediate Report and Recommended Order at Appx. 31-53; Board's Decision and Order at Appx. 25-31.)

JURISDICTION.

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on July 6, 1965. This petition is filed within ninety days thereafter as required by Rule 22(1) and computed under Rule 34(1) of this Court. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

Whether upon petition for enforcement of an order of the National Labor Relations Board, the United States Court of Appeals for the Seventh Circuit has followed the standard of review rule as enunciated by this Court in *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474 (1951), and as applied in other Circuits, or whether said court misapprehended and misapplied such standard requiring the intervention of this Court in order to assure uniform application of the National Labor Relations Act?

STATUTES INVOLVED.

Section 10(e), Administrative Procedure Act, 5 U. S. C. § 1009(e):

> "Section 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—
>
> * * * * * *
>
> (e) Scope of review: So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency

action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

Section 10(e), National Labor Relations Act, 29 U. S. C. § 160(e):

"Sec. 10. * * *

* * * * * *

(e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of (its) order * * * Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board, * * * The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *"

Section 7, National Labor Relations Act, 29 U. S. C. § 157:

> "Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a) (3)."

Section 8(a)(1), National Labor Relations Act, 29 U. S. C. § 158(a)(1):

> "It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;"

Section 8(a)(5), National Labor Relations Act, 29 U. S. C. § 158(a)(5):

> "It shall be an unfair labor practice for an employer—
>
> * * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

STATEMENT.

Petitioner, My Store, Inc., operates a food store at Taylorville, Illinois where it is engaged in the retail sale of meat, dairy, grocery, and related products. This store is the only retail facility owned by Petitioner which is involved in this proceeding.

On May 8, 1963, the United Retail Workers' Union (hereinafter called the "Union") filed the unfair labor

practice charge against Petitioner upon which a Complaint was issued on July 17, 1963 (J. A. 174-176; G. C. Ex. 1(a); J. A. 179-186; G. C. Ex. 1(c)). On August 12, 1963, the Union filed an amended unfair labor practice charge and thereafter a First Amended Complaint based upon this charge was issued on August 29, 1963 (J. A. 195-197; G. C. Ex. 1(f); J. A. 201-209; G. C. Ex. 1(h)). Petitioner filed timely Answers denying the allegations in both of the above-mentioned Complaints (J. A. 190-195; G. C. Ex. 1(e); J. A. 213-217; G. C. Ex. 1(j)).

The gravamen of the Complaints is that Petitioner, by interrogation, threats, rescission of employee privileges, refusing to bargain with the Union, and refusing to reinstate strikers, thereby interfered with its employees' statutory rights in violation of Sections 8(a) (1), (3) and (5) of the Labor-Management Relations Act (29 U. S. C. § 151, et seq.). On September 10, 11, and 12, 1963, a hearing on these issues was held at Taylorville, Illinois before Trial Examiner Phil W. Saunders. Thereafter, on December 9, 1963, he issued and caused to be served upon the parties his Decision in which he found Petitioner guilty of the unfair labor practices alleged in the Complaints (J. A. 10-37). Petitioner filed timely exceptions with the National Labor Relations Board to this Decision and on May 25, 1964, the National Labor Relations Board issued its Decision and Order affirming the Examiner's Decision (J. A. 3-9).

On August 26, 1964, the National Labor Relations Board petitioned the United States Court of Appeals for the Seventh Circuit for enforcement of its Order issued on May 25, 1964 (J. A. 2-3). A Petition for Rehearing was denied. By Decree entered on July 6, 1965, the court granted enforcement of the Board's order.

The portions of the proceedings below pertinent for purposes of this petition concern the motivation causing the

strike which occurred on May 2, 1963. The Board, in adopting the Trial Examiner's Findings, held that the strike was caused or motivated by Petitioner's alleged unfair labor practices, and further that the strikers were entitled to reinstatement as of July 11, 1963 when they unconditionally offered to return to work (Appx. 50; J. A. 29-30). The court below affirmed this finding, holding that certain events occurring after the strike began showing that the strike was economically motivated, were not "conclusive" and that, therefore, the Board's ruling was supported by substantial evidence on the record considered as a whole.

Negotiations Prior to the Strike.

On February 21, 1963, a consent election was conducted by the Board which the Union won by four votes (J. A. 39). On February 27, 1963, before the Union had been certified as the bargaining agent for Petitioner's employees, a meeting took place at the offices of Hershey and Bliss, Petitioner's attorneys. In addition to Petitioner's attorneys, Charles Bliss and Lee Ensel, the meeting was also attended by Pasquo Podeschi, President of Petitioner, and three Union officials from Chicago (Messrs. Klawatter, Koukl and Egert).

At this meeting, certain preliminary matters were disposed of in order to permit contract negotiations to proceed on the material issues. In addition, it was explained to Mr. Podeschi, who was totally unfamiliar with collective bargaining, how contracts are negotiated, what the Union contract would provide for generally, and that the Union would submit its suggested form of contract shortly (J. A. 157).

The next meeting was set for April 4, by mutual agreement. Sometime shortly before this meeting the Union had forwarded General Counsel's Exhibit 5 to Petitioner (J. A.

226-250). This document was a complete labor agreement which presumably was to serve as the Union contract proposal. Following the customary pattern, a great portion of the April 4 meeting was consumed in going over the Union's proposal point by point (J. A. 64-65). Despite this tedious process "major discussions" took place and a number of concessions were made by the Petitioner (J. A. 64). By the Union Negotiator's own testimony, this discussion produced concessions on vacations (J. A. 68-69), checkoff (J. A. 71), posting work schedules (J. A. 66-67), term of contract (J. A. 72) and lunch periods (J. A. 67).

Extensive discussions apparently ensued at this meeting on the following subjects but which resulted in no concessions by Petitioner: union shop (J. A. 71), department heads (J. A. 68), and retroactive pay (J. A. 71-72).

The next meeting was held one week later on April 11. Considerable discussion ensued at this meeting concerning posting of work schedules. Although Petitioner agreed to concessions on this item, little agreement was reached because the Union Negotiators had no authority to deviate from the form contract (G. C. X. 5) without consulting Melvin Waters, International Representative, who was in Chicago (J. A. 62-63).

The last meeting before the strike and the third meeting within 18 days was held on April 21. According to Union Negotiator Burki's testimony there were only three major items in contention at this time, i.e., "union shop, term of contract and department heads." (J. A. 74.)[1]

Burki admits to some progress being made at this meeting but characterized it as very minor (J. A. 75). In fact,

1. The Union's insistence not only on the creation of these managerial "department heads" but on the continuing representation of them by the Union was clearly illegal inasmuch as supervisors are expressly excluded from coverage under the Act (Section 2(11)).

it appears that an impasse was reached on the so-called "major contentions". Burki testified that "it was concluded by all that it looked like we had reached an impasse, a continual impasse." (J. A. 75.) Burki further quotes himself as saying at the end of this meeting that "the only way the Union could make their desires known a little more forcefully was to go back and discuss this with our members and let them know what had transpired at the various meetings and let them make a decision if we should do anything." (J. A. 75.)

The Strike.

On April 29, a meeting was held for the purpose of voting to take strike action. The meeting was not a meeting of the Petitioner's employees but a meeting of all Union members in the area (J. A. 94). Of the 55 people present only 20 or 21 of Petitioner's employees were there (J. A. 94). This was a minority of Petitioner's employees. The majority did not attend. As a result of the vote taken at this meeting, a strike against Petitioner was scheduled for May 2 (J. A. 97).

On May 2, 22 of 49 employees went on strike and the balance came to work as usual. At no time did a majority of the employees join the strike. On May 7, the Petitioner sent, by registered mail, a copy of Petitioner's Exhibit 6 to all striking employees. With the exception of Shanks, who was apparently out of town, the strikers received copies of this exhibit on May 8, 1963 (J. A. 381; Supp. A. 26-27). This notice offered to reinstate each of the strikers to work under the same terms as then in effect.

Despite some vague, self-serving uncorroborated statements by Waters, who had not been present in any negotiations, concerning "lack of cooperation" and "inconsistency

in our negotiations," (J. A. 97) the evidence is clear and unequivocal as to why the strike was called.

In addition to the testimony of Union Negotiator Burki referred to above at the last negotiation meeting before the strike, immediately after the strike, the Union, in a paid advertisement in the Taylorville newspaper on May 4, further stated its reasons for calling the strike (Resp's Ex. 9; J. A. 385). This advertisement which is in question and answer form contains the following item:

> **"What Are the Issues That Caused This Strike?"**
>
> "Mr. Podeschi, the owner of My Store, absolutely refuses to pay Union wages or provide his employees with Union benefits and Union working conditions."

Similarly, in a pamphlet distributed at the time of the strike, wages are mentioned as the primary incentive for employees to support the strike (Resp's Ex. 8; J. A. 383). This pamphlet stated in part:

> "Mr. Podeschi—WILL NOT
>
> Pay Union Scale—Like Every Other union grocery in your town
>
> OR
>
> Agree to 27 Separate Contract Terms already benefiting union members and employees all over the country.
>
> "In short he will not agree to treat his employees as human beings. He is determined to CONTROL them as he does the animals on his farm.
>
> "Your Friends and Neighbors who work in this store have voted in secret ballot for this strike.
>
> "Support Them—Strike a blow for better conditions for ALL Taylorville."

REASONS FOR GRANTING THE WRIT.

In the important and oft-cited case of *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474 (1951), this Court admonished the Courts of Appeals that in reviewing decisions of the National Labor Relations Board, the courts had a special duty and "a responsibility which has not always been recognized" to set aside Board decisions when the courts:

> ". . . cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its *entirety* furnishes, *including the body of evidence opposed to the Board's view.*" (340 U. S. 488.) (Emphasis added.)

More recently, this Court has reiterated the importance of active and thorough review of Board decisions by the Courts of Appeals. *American Shipbuilding Co.* v. *NLRB*, 85 S. Ct. 955, 967 (1965); *NLRB* v. *Brown*, 85 S. Ct. 980, 988 (1965).

In announcing the above standard for review for Labor Board decisions, this Court also stated that it would not intervene unless the standard "appears to have been misapprehended or grossly misapplied" (340 U. S. 491). The Petitioner respectfully submits that the court below "misapprehended and grossly misapplied" the above test enunciated by this Court.

One of the crucial issues before the court below and the only issue relevant for purposes of this Petition is the motivation behind the strike which occurred on May 2, 1963. The Trial Examiner found that the strikers were unfair labor practice strikers entitling them to reinstatement upon their unconditional offer to return to work; in his view, the strike was "substantially motivated" by the alleged unfair labor practices of Petitioner. The Trial Examiner in effect conceded, however, that the strike was

in part motivated by economic considerations (Appx. 50; J. A. 29). The Board affirmed the Trial Examiner's finding in its decision of May 25, 1964, in a perfunctory short form opinion without any apparent attempt to analyze the evidence showing that the strike was economically motivated.

As stated above, the evidence supporting the Petitioner's contention in this regard consists of the following admissions by the Union: (1) a paid advertisement by the Union in the Taylorville "Breeze Courier" on May 4, 1963, asking: "**What Are the Issues That Caused This Strike?**" The Union unequivocally answered its own question: "Union Wages . . . Union Benefits and Union Working Conditions" (Resp's Ex. 9; J. A. 385), (2) a handbill distributed to shoppers in front of Petitioner's store during the strike which again unequivocally stated that the strike was caused by Podeschi's failure to "Pay Union Scale . . . OR . . . Agree to 27 Separate Contract Terms already benefiting union members" (Resp's Ex. 8; J. A. 383), and (3) the testimony of Union Negotiator Burki who was in charge of the negotiations for the Union at the last negotiation meeting (April 22) before the strike to the effect that the Union considered that there were three major areas of disagreement on the previously discussed "union shop, term of contract, and department heads"; that since this last meeting produced no results satisfactory to the Union on these points, Burki concluded "that the only way that the Union could make their desires known a little more forcefully . . ." was to take the strike vote (J. A. 74, 75).

The Circuit Court, however, apparently failed to analyze the above evidence that the strike was for economic considerations, finding "substantial evidence" to the contrary. In dismissing the Petitioner's contention that the strike was economically motivated the court announced a most

unusual test for determining the weight to be accorded evidence contrary to the Board's findings. The court stated:

> "We find substantial evidence to support the findings of the Board that the strike which began on May 2 was at least in part a result of respondent's unfair labor practices. . . .
>
> "That Union publicity *during the strike* gave as the reason for it respondents' refusal to grant certain economic demands *is not conclusive that the strike was solely an economic one.*" (Emphasis added.) 345 F. 2d 498.

The Petitioner strongly urges that the court's standard of review is not compatible with the standard announced by this Court in *Universal Camera,* and in fact is a misapprehension and gross misapplication of it. First, the court below admittedly did not consider the admissions of Burki which occurred before the strike. This is clear from the court's reference to "Union publicity *during the strike.*" Limiting the consideration of evidence that the strike was economically motivated to such evidence as occurred after the beginning of the strike is clearly not responsive to the requirement that the record be considered as a whole.

Second, the court has stated that before a lack of substantial evidence supporting the Board's decision shall be found, the body of evidence opposing that view must *conclusively* prove that the Board was wrong. This is also not responsive to the admonition of *Universal Camera.* There, the Court of Appeals for the Second Circuit considered only the evidence tending to support the Board's view, finding that evidence substantial when considered in abstract or isolation. But this Court stated that "the substantiality of evidence must take into account whatever in the record *fairly detracts* from its weight." (340 U. S. 488.) (Emphasis added.)

A court reviewing a Board finding should look at the

evidence which contradicts the Board's finding for the purpose of evaluating the substantiality of the evidence supporting the Board's finding and not for the purpose of determining whether such evidence conclusively proves that the Board's finding was wrong. That there is a great difference between these two approaches to reviewing the evidence can be illustrated by reference to the facts in *Universal Camera.* The disputed question there was whether an employee's discharge was for insubordination or was retaliation for testifying against the employer in an unfair labor practice proceeding. Shortly after the hearing, the employee and the personnel manager had an altercation during which the employee accused the personnel manager of being intoxicated. The Board found that the subsequent discharge was caused not by insubordination but the employee's giving adverse testimony at a Board proceeding and ordered reinstatement with back pay. The Second Circuit affirmed, finding substantial evidence (when considered in isolation) to support the Board's finding. 179 F. 2d 749 (2nd Cir. 1950).

While it certainly cannot be said that the showing of insubordination "conclusively" proves that testifying before the Board was not the reason for the discharge, such a showing does rob that evidence supporting the Board of much of its substantiality, or "given the quite adequate basis for a justified discharge, there is an insufficient basis upon which a dispassionate mind can ripen this possibility into a finding." *Jaffe, Judicial Review; "Substantial Evidence on the Whole Record,"* 64 Harv. L. Rev. 1233, 1244 (1951).

On remand, the Second Circuit, following this Court's admonition, found that there was no substantial evidence to support the Board's findings and dismissed the Board's petition to enforce its reinstatemet with back pay order,

NLRB v. *Universal Camera Corp.*, 190 F. 2d 429 (2d Cir. 1951).

In order to fully appreciate the significance of the difference between the proper application of the substantial evidence test and the Seventh Circuit's improper application of it, it is useful to examine the rationale of the substantial evidence test and see how the requirement that the Board be conclusively proven wrong not only is not responsive to this rationale but actually undermines it. Ultimately, the requirement that a finding be supported by substantial evidence on the whole record is an attempt to guarantee that the fact-finder arrive at his findings "not by consulting his moral predisposition or his general sense of justice, but *by reasoning from the evidence.*" *Jaffe, Judicial Review: Question of Fact*, 69 Harv. L. Rev. 1020, 1022 (1956).

By guaranteeing the existence of a rational link between the evidence and the findings of fact, the substantial evidence test goes a long way to reduce the role of the will of the fact-finder, and limits "the opportunity for transmuting a preconception into judgment by picking and choosing what will support that preconception and *wilfully ignoring whatever weighs against it.*" *Id.*, at 1032.

Thus, this Court in *Universal Camera* went out of its way to reject the "something in the evidence" approach which looked at the evidence supporting the finding and ignored the rest of the record, for the reason that such an interpretation of the substantial test does not go far enough to secure the rationality which the genuine substantial evidence test seeks to guarantee. Similarly, the "conclusive proof" test adopted by the Seventh Court fails to preserve the safeguards erected by the proper version of the substantial evidence test, for it is quite possible that one might be unable to prove conclusively that the Board was wrong

even though the evidence detracting from the Board's finding make it such that the Board *could not have fairly reasoned from the whole record as to it findings.* If the Labor Board or any other agency knows it will not be reversed without conclusive proof of its error, the temptation to use routes other than the rational to proceed from evidence to findings will be greatly increased. In short, the necessary relation that exists between rationality and the existence of substantial evidence does not exist between rationality and conclusive proof that the Board was wrong.

The Petitioner wishes to emphasize that it is not requesting this Court to review the substantiality of the evidence in the instant case. *NLRB* v. *Pittsburgh S. S. Co.*, 340 U. S. 498 (1951). The crucial question here is whether the court below misapprehended and misapplied the test of *Universal Camera* by viewing evidence contrary to the Board's decision not in terms of its effect on the evidence supporting the Board, but in terms of its integrity for purposes of proving the Board conclusively wrong.

This Court's intervention in similar situations is not without precedent. In *NLRB* v. *Walton Manufacturing Company*, 369 U. S. 404 (1962), this Court granted certiorari to review two cases decided by the Fifth Circuit Court of Appeals. In this Court's view, the Fifth Circuit had fashioned a special test of its own for determining substantial evidence in reinstatement cases which was contrary to the statutory scheme and *Universal Camera*. There the Fifth Circuit held that an employer's statement under oath must be believed unless there is "impeachment" of him or "substantial contradiction." This Court held that such a credibility test was too strict and that substantial evidence may be based on contrary testimony regardless of whether the employer's testimony was "impeached" or "substantially contradicted."

Similarly here, the special test fashioned by the Seventh Circuit is too strict. Whereas the Fifth Circuit required "impeachment" or "substantial contradiction" of testimony, the Seventh Circuit here has required conclusive proof that the Board was wrong before the Board will be reversed. In either case the effect is the same: the failure by the court to properly evaluate evidence contrary to the Board's findings by requiring too strict a standard before such evidence shall be considered as "fairly detracting" from the evidence supporting the Board's decision.

CONCLUSION.

The misapprehension and improper application of the substantial evidence test by the court below requires intervention and correction by this Court. This is particularly true in a case of this nature where the subjective motivation causing the strike was not only within the peculiar knowledge of the Union but was *detrimental* to the Union encouraging concealment. For Petitioner to obtain *any evidence* of the strike motivation was very difficult at best; to require *conclusive* proof of the *entire* motivation under these circumstances is literally impossible.

It is submitted that the Seventh Circuit's summary rejection, as *inconclusive,* of plain and unequivocal official Union admissions in writing, which ask and answer in detail the ultimate question to be decided demonstrates the extent to which the court has disregarded the admonition expressed in *Universal Camera.* Indeed, if the court's own misconception of the substantial evidence test has not been fulfilled in this case, it is difficult to perceive how such proof could ever be attained.

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX.

IN THE UNITED STATES COURT OF APPEALS
for the Seventh Circuit.

No. 14770 September Term, 1964 January Session, 1965

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,
v.
MY STORE, INC., *Respondent*.
} On Petition for Enforcement of an Order of the National Labor Relations Board.

April 7, 1965

Before CASTLE, KILEY and SWYGERT, *Circuit Judges*.

KILEY, *Circuit Judge*. The National Labor Relations Board seeks enforcement of its order based on findings that respondent violated Sections 8(a)(1), (3) and (5) of the National Labor Relations Act, as amended, 29 U. S. C. § 151, *et seq*. We decide that the order should be enforced.

Respondent My Store, Inc. is owned by Pasquo Podeschi and operates a supermarket employing about fifty persons in Taylorville, Illinois. Respondent's employees had never been organized until the United Retail Workers Union, at the request of one or more of the employees, began an organizational campaign in December 1962. Subsequently, at the union's petition, an election was ordered for Febru-

ary 21, 1963, and the union won. Unfair labor practice charges based on respondent's conduct prior to and in connection with the election were made by the union on February 26. These charges were not pressed by the union as the parties began negotiations toward a contract. The charges were subsequently dismissed for want of prosecution. Bargaining negotiations were unsuccessful and the union struck the plant on May 2. On May 8 the charges before us were filed. The hearing followed, resulting in the Board's decision, challenged here by respondent.

A review of the record and of the decision and order of the Board and the report of the trial examiner, reported at 147 N. L. R. B. No. 16, shows that the findings of the Board and the examiner are supported by substantial evidence on the record as a whole. We cannot, in our limited power of review, say that the Board should have adopted respondent's version, instead of the General Counsel's of the facts or the inferences to be drawn therefrom, or substitute contrary findings where the record supports the Board's findings of fact. *Saginaw Furniture Shops, Inc.* v. *N. L. R. B.*, No. 14102, 7th Cir., Feb. 15, 1965.

The Board did not err in finding that respondent violated Secs. 8(a)(1) and (3) of the Act by threats, intimidation and rescission of benefits, all aimed at interfering with the employees' organizational and bargaining rights. After Podeschi was notified by the Board that his employees had signed authorization cards and that an election would be held, Podeschi, his son and another employee interrogated the employees about signing the cards and some were asked about who was behind the union effort. We agree with respondent that interrogation is not unlawful per se, *Frank and Sullivan and Company*, 133 *N. L. R. B.* 726, 727 (1961); *Blue Flash Express, Inc.*,

109 N. L. R. B. 591, 593 (1954), but that rule is inapplicable here, where the interrogation was in an atmosphere of animosity toward the union on the part of Podeschi, directed toward discovering identity of the union organizers, and was in fact coercive. *N. L. R. B.* v. *Mid-West Towel & Linen Service, Inc.*, 339 F. 2d 958 (7th Cir. 1964); *N. L. R. B.* v. *Economy Food Center, Inc.*, 333 F. 2d 468, 470 (7th Cir. 1964).

The day following verification by the Board's Regional Director of the authenticity of the employees' signatures on the authorization cards, determined by comparison with the signatures obtained by respondent from the employees, Podeschi called the employees together and angrily lectured them against the union and for denying when interrogated previously that they had signed the authorization cards. Podeschi then told them that certain privileges were being withdrawn, that he could eliminate fifteen jobs if he wanted to, and that he had an offer to sell the store. The withdrawn benefits were not themselves very substantial, but this conduct was an element to be considered in the totality of unlawful interference with Sec. 7 rights in violation of Secs. 8(a)(1) and (3).

We think also that the Board did not err in finding Sec. 8(a)(3) and (1) violations in that respondent discriminatorily cut the hours of employment of eight union adherents. There is no question that the hours of these employees were cut. The only question was whether the cutting was because of economic reasons recognized by the union, as respondent contends, or because the employees affected were singled out as object lessons because of the union activity. We find no persuasive showing in favor of respondent in its oral testimony and graphs of economic necessity for the reductions in hours immediately following the organizational movement, or that there was mere coincidence in the fact that those

whose hours were cut were known or suspected by Podeschi of being the leaders of the movement.

Respondent contends that the Board could not base findings of 8(a)(1) and (3) violations on evidence of respondent's conduct prior to February 26, 1963, or use such conduct as evidence of respondent's bad faith in bargaining because of the union's "agreement to drop" the original pending unfair labor practice charges and the dismissal of the complaint by the Board's Regional Director. The Board's finding was that the union had merely agreed to hold the charges "in abeyance" in order "to clear away all extrinsic issues and pave the way for productive bargaining . . ." and the complaint was dismissed not on the merits, but solely for want of prosecution. But even assuming, though not deciding, that there was an agreement by the union to drop the charges, the Board could not be precluded from hearing the complaint filed on May 8, 1963. A hearing before the Board is in furtherance of a public policy, not to vindicate a private right, *N. L. R. B.* v. *General Motors Corp.*, 116 F. 2d 306, 311-12 (7th Cir. 1940) and the "judicial concept of estoppel" may not be invoked to frustrate the purposes of the Act. *Wallace Corp.* v. *N. L. R. B.*, 323 U. S. 248 (1944); *N. L. R. B.* v. *T. W. Phillips Gas & Oil Co.*, 141 F. 2d 304 (3d Cir. 1944); *cf. N.L.R.B.* v. *Fitzgerald Mills Corp.*, 313 F. 2d 260, 265 (2d Cir.) cert. denied 375 U. S. 834 (1963).

There is substantial evidence in the record to support the Board's finding that respondent violated Secs. 8(a)(5) and (1) by failing to bargain in good faith with the certified bargaining agent of its employees. In reaching this determination the Board was entitled to take into consideration, among other things, the animosity toward the union displayed by respondent before the negotiations

began,[1] Podeschi's repeated claim that a reply to his letter to Washington would vindicate his claim that the part-time employees should not have been permitted to vote and that the election was invalid,[2] his refusal to agree to more than a one year contract on grounds that another election would be held in a year and the union would be out, his refusal to bargain on wages based on job classifications on the ground that there were none, when respondent's records showed otherwise,[3] the failure and delay of respondent in supplying requested information[4] or to make a counter-offer for more than four months and the lack of any substantial agreement on major issues after protracted negotiations. There is no merit in respondent's contention that the Board's reliance on the lack of agreement amounts to passing on the merits of the demands and putting pressure on respondent to accede to the union demands. Lack of agreement was merely one element among many considered as bearing on the issue of good faith. An employer is not, and may not be, required to yield on positions fairly maintained, but it may not use those positions as a "cloak" behind which to conceal a purposeful strategy to give the union a "run-around

1. *N. L. R. B.* v. *Southwestern Porcelain Steel Corp.*, 317 F. 2d 527 (10th Cir. 1963); *N. L. R. B.* v. *Fitzgerald Mills Corp.*, 313 F. 2d 260, 264 (2d Cir. 1963).

2. Respondent had made no objection to the part-time employees being included in the unit for the purpose of the consent election, and even a good faith belief that the part-time employees were not properly part of the unit is immaterial in determining whether the refusal to bargain was an unfair labor practice. *United Aircraft Corp.* (*Hamilton Standard Division*) v. *N. L. R. B.*, 333 F. 2d 819 (2d Cir. 1964), *cert. denied* 33 *U. S. L. Week* 3286 (March 1, 1965); *Taylor Forge & Pipe Works* v. *N. L. R. B.*, 234 F. 2d 227 (7th Cir.), *cert. denied* 352 U. S. 942 (1956).

3. "Good faith bargaining necessarily requires that claims made by either bargainer should be honest claims." *N. L. R. B.* v. *Truitt Mfg. Co.*, 351 U. S. 149, 152 (1956).

4. *N. L. R. B.* v. *Truitt Mfg. Co.*, 351 U. S. 149 (1956); *N. L. R. B.* v. *Fitzgerald Mills Corp.*, 313 F. 2d 260 (2d Cir. 1963).

while purporting to be meeting with the Union for the purpose of collective bargaining." *N. L. R. B.* v. *Herman Sausage Co.*, 275 F. 2d 229, 232 (5th Cir. 1960); *N. L. R. B.* v. *Southwestern Porcelain Steel Corp.*, 317 F. 2d 527 (10th Cir. 1963).

We find substantial evidence to support the findings of the Board that the strike which began on May 2 was at least in part a result of respondent's unfair labor practices and that the union made an unconditional offer on behalf of the strikers to return to work. The unfair labor practices (described as such) prior to the beginning of negotiations and the conduct of respondent during the course of negotiations were related to the union members at a meeting and they voted unanimously to strike. That union publicity during the strike gave as the reason for it respondent's refusal to grant certain economic demands is not conclusive that the strike was solely an economic one. Since respondent failed to discharge replacements and take back the strikers, it violated Sec. 8(a)(3), and the Board's order of reinstatement with back pay was justified. That there may also have been economic reasons for the strike did not deprive the strikers of their rights as unfair labor practice strikers, *N. L. R. B.* v. *Fitzgerald Mills Corp.*, 313 F. 2d 260, 269 (2d Cir. 1963).

Enforcement ordered.

My Store, Inc. and United Retail Workers Union. Case No. 14-CA-3050. May 25, 1964

DECISION AND ORDER.

On December 9, 1963, Trial Examiner Phil W. Saunders issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief, and the Union filed cross-exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel [Chairman McCulloch and Members Leedom and Brown].

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the Respondent's exceptions and brief, the Union's cross-exceptions, and the entire record in this case,[1] and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the following additions and modifications.

The Trial Examiner's Decision found certain unfair labor practice violations, but failed to recommend a fully appropriate remedy for them. Without deciding whether the Trial Examiner had jurisdiction to issue errata amend-

1. The Respondent has requested oral argument. The request is hereby denied; the exceptions and the briefs adequately present the issues and positions of the parties.

ing his Decision after it had issued and the case had been transferred to the Board, we shall frame an appropriate remedy for the violations found.

THE REMEDY.

We shall order the Respondent to offer the unfair labor practice strikers, whose unconditional application for reinstatement was unlawfully rejected on or about July 11, 1963, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority and other rights and privileges, discharging, if necessary, any replacements in order to provide work for such strikers. We shall also order that the Respondent make whole for any loss of pay that they may have suffered by reason of the Respondent's discrimination against them, by paying to each of these employees a sum of money equal to the amount that he normally would have earned as wages from the date of his unconditonal application for reinstatement to the date of the Respondent's offer of reinstatement, less his net earnings during said period. The amount of backpay due shall be computed according to the Board's policy set forth in *F. W. Woolworth Company*, 90 NLRB 289. Payroll and other records in possession of the Respondent are to be made available to the Board, or its agent, to assist in such computation and in determining the right to reinstatement. Interest on backpay shall be computed in the manner set forth in *Isis Plumbing and Heating Co.*, 138 NLRB 716. Similarly, we shall order the Respondent to make whole the employees whose hours of employment were discriminatorily reduced from February 1, 1963, until they joined the strike on May 2, 1963.

ORDER.

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, My Store, Inc., Taylorville, Illinois, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in United Retail Workers Union or in any other labor organization of its employees, by reducing hours or refusing to reinstate any of its employees because of their concerted or union activities, or in any other manner discriminating in regard to their hire or tenure of employment or any term or condition of employment.

(b) Refusing to bargain collectively in good faith with the Union as the exclusive bargaining representative of all employees of the Respondent in the appropriate bargaining unit described herein.

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form, join, or assist labor organizations, including the above-named Union, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining, or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act, as amended by the Labor-Management Reporting and Disclosure Act of 1959.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively in good faith with United Retail Workers Union as the exclusive representative of all employees of the Respondent's store at Taylorville, Illinois, including part-time employees, but excluding the store manager, all professional employees, guards, and supervisors as defined in the Act, with respect to rates of pay, wages, hours of employment, and other conditions of employment, and, if an understanding is reached, embody such understanding in a signed written agreement.

(b) Offer to the employees who on or about July 11, 1963, made unconditional request for reinstatement, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges.

(c) Make whole the employees whose hours of employment were discriminatorily reduced, and also the employees whose application for reinstatement was discriminatorily rejected, in the manner set forth above, for any loss of pay each may have suffered by reason of the Respondent's discrimination against him.

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the reinstatement right and amounts of backpay due under the terms of the Order.

(e) Post at its store in Taylorville, Illinois, copies of the attached notice marked "Appendix."[2] Copies of said

2. In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "a Decision and Order" the words "a Decree of the United States Court of Appeals, Enforcing an Order."

notice, to be furnished by the Regional Director for the Fourteenth Region, shall, after being duly signed by the Respondent's representative, be posted by the Respondent immediately upon receipt thereof, and be maintained by it for a period of at least 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that such notices are not altered, defaced, or covered by any other material.

(f) Notify said Regional Director for the Fourteenth Region, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith.

APPENDIX.

Notice to All Employees.

Pursuant to a Decision and Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

> We will, upon request, bargain collectively with United Retail Workers Union, as the exclusive representative of all employees in the following unit with respect to rates of pay, wages, hours of employment, and other conditions of employment, and, if an understanding is reached, embody it in a signed agreement. The unit is:
>
> > All employees of our store located in Taylorville, Illinois, including part-time employees, but excluding the store manager, all guards, professional employees, and supervisors.
>
> We will offer the employees, who on July 11, 1963, made unconditional request for reinstatement, immedi-

ate and full reinstatement to their former positions, without prejudice to seniority and other rights and privileges.

WE WILL make all employees whole for any loss of pay suffered as a result of refusing to reinstate them or reducing their hours.

WE WILL NOT discourage membership in United Retail Workers Union, or any other labor organization of our employees, by reducing hours, or refusing to reinstate any of our employees because of their concerted or union activities, or in any other manner discriminating in regard to their hire or tenure of employment or any term or condition of employment.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the right to self-organization, to form labor organizations, to join or assist the Union or any other labor organization, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining, or other mutual aid or protection, or to refrain from any or all of such activities.

All of our employees are free to become or remain, or to refrain from becoming or remaining, members of any labor organization, except to the extent that this right may be affected by an agreement in conformity with Section 8(a)(3) of the Act, as amended. We will not otherwise discriminate in regard to hire or tenure of employment against any employee because of membership in, or activity on behalf of, any labor organization.

MY STORE, INC.,
Employer.

Dated ..... By .....
(Representative) (Title)

NOTE.—We will notify the employees to be reinstated, if presently serving in the Armed Forces of the United States, of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 4459 Federal Building, 1520 Market Street, St. Louis, Missouri, Telephone No. Main 1-8100, Extension 4142, if they have any question concerning this notice or if they have information that its provisions are being violated.

TRIAL EXAMINER'S DECISION.

STATEMENT OF THE CASE.

This case was heard by Trial Examiner Phil W. Saunders at Taylorville, Illinois, on September 10, 11, and 12, 1963. The General Counsel and My Store, Inc., herein called the Respondent or the Company, were represented by counsel and all parties participated fully in the hearing. The parties also submitted briefs which have been duly considered by me in arriving at my findings and recommendations herein.[1]

The amended complaint alleges that on certain dates the Respondent, in various ways, interrogated and threatened employees, rescinded privileges, granted wage increases, and reduced hours of employment of eight employees who

1. This case came up for hearing on a charge dated May 8, 1963. The original complaint is dated July 17, 1963, a first amended complaint is dated August 29, 1963, and the complaint was also amended at the outset of the hearing on September 10.

are specifically named—all because of union activities. It is also alleged that the Company refused to bargain collectively with the Union, and that on May 2, 1963,[2] 16 employees went on strike—caused by the unfair labor practices of the Company. It is alleged that all such conduct is violative of Section 8(a)(1), (3), and (5) of the Act.

Upon the entire record, and from my observations of the witnesses, I hereby make the following:

Findings of Fact.

I. The Business of the Respondent.

At all times material herein the Respondent has maintained a retail store in Taylorville, Illinois, and is therein engaged in the sale and distribution of meat, dairy, grocery, and related products. (The Taylorville store is the only retail store of the Company involved in this proceeding.)

Annually the Respondent sells and distributes products the gross value of which exceeds $500,000, and annually the Company receives products valued in excess of $50,000 —transported to its place of business in Taylorville, Illinois in interstate commerce, directly from States other than Illinois. I find, therefore, that the Respondent is engaged in commerce as defined by the Act.

II. The Labor Organization Involved.

United Retail Workers Union, herein called the Union, is a labor organization as defined in Section 2(5) of the Act.

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2. All dates are 1963 unless specifically stated otherwise.

III. The Alleged Unfair Labor Practices.

A. The Factual Events.

In December 1962, employee James Cooper contacted the Union expressing a desire to organize the Company, and during January 18, and 19 the Union secured signatures from Respondent's employees. On January 24 a petition for an election was filed by the Union, and shortly thereafter the Respondent's president, Pasquo Podeschi, was contacted by a representative of the Board's Regional Office in St. Louis, advising Podeschi that the petition had been filed—supported by authorization cards. Podeschi then had employee Edward Poor and his son, Marcel Podeschi, assist him in asking each of the Respondent's employees whether or not they had been contacted by the Union and had signed cards.[3] Employee Don Spindel credibly stated that Podeschi asked him if he had been contacted by union representatives, if he had signed a card, if Spindel knew who would have started the union efforts, and that on this occasion Podeschi also inquired if Spindel would help to find out who started the union activities. Employee Wiggs was also asked by Marcel Podeschi if union representatives had attempted to get him to sign a card, and Podeschi asked Wiggs if he knew who was behind the Union—Podeschi then informed Wiggs that he thought Spindel and Cooper were the employees behind the union efforts.

Podeschi then had each employee sign his name and address on a slip of paper, so their signatures could be taken to the Board's Office in St. Louis and compared with the signatures on the authorization cards.[4]

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3. Podeschi testified that out of all employees contacted—only three admitted any activities for the Union.

4. Each of the 49 employees signed such a slip of paper. Podeschi explained that this was done because when the employees were questioned, as aforesaid, only three of them had admitted

This record further shows that on January 31, a conference was held at the Board's Regional Office in St. Louis. Podeschi asked that the 49 slips of paper be checked against the authorization cards, and after comparisons were made Podeschi was then advised that the cards contained valid signatures. A question was also raised at this conference relative to the eligibility of several employees who were working for the Company under a program in connection with Taylorville High School.[5]

On February 1, Podeschi called his employees together for a meeting in the store, at which time he stated that the employees had gone behind his back in getting a union and that they should have come to him. Podeschi then went on to tell the employees that he was tired of playing "Santa Claus," that they could no longer get haircuts on company time and could no longer use the battery charger or cables, that coffee breaks would be without talking or argument, and that there would be no congregating in the store kitchen. At this meeting Podeschi also further inquired of several employees if representatives of the Union had contacted them about signing cards, and then stated that he could cut off 15 jobs if he wanted to. Podeschi further informed employee Frank Sartore that he would not need his son Lonnie any more except possibly on weekends, and also stated to the employees on this occasion that he could sell the store any time, and then produced a postcard which he indicated was an offer to buy the store.[6]

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any union affiliation. When employees were asked to sign the slips of paper—some were told that the Company thought someone had been hired to turn in names for a union or that the cards submitted by the Union bore forged signatures.

5. This program is known as the "D. E." or "D. O." program, and in essence the students involved work at the store part time while also attending school classes, and then received grades as to both.

6. In the separate conversation with Frank Sartore—Podeschi asked Sartore how he would like to work for a week's salary on a clerk's wages—and also how he would like to have his hours

This record shows that prior to February, the Respondent's employees were not formally scheduled to work, as such. Most employees worked regular hours, however, and approximately 63 to 65 hours per week. On or about February 5 or 6, the Company started a program whereby each employee was scheduled for definite working hours, and in furtherance of this program a schedule was given to each employee. General Counsel's Exhibit No. 16 shows that the eight employees named in the complaint suffered a reduction in the number of hours they worked, and which reduction commenced in the week beginning February 3.[7]

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cut. Sartore had a total employment of 16 years. Podeschi also in February inquired of employee Wiggs if he knew who was behind the Union, and then informed Wiggs he thought Cooper, Walker, Spindel, Garmon, and the "school kids" were the ones.

7. Cooper, who had worked as many as 74 hours per week prior to that time, had his hours reduced: first, to 48 hours per week, then to 46 hours per week, then to 23 hours per week, then to 20 hours per week, bottoming at 19½ hours in the week ending April 11, 1963. Ginger, who had averaged approximately 40 hours per week prior to February 1963, had his hours reduced: first, to 31 hours per week, then to approximately 24 hours per week, then to approximately 18½ hours per week; bottoming at 8 hours in the week ending April 4. Mahan, who had averaged approximately 39 hours per week prior to February, had his hours reduced, so that for the months of February, March, and April he averaged 21 hours per week, and worked as few as 10½ hours during the week ending April 4. Reed, who had averaged approximately 40½ hours per week prior to February 1963, worked as many as 46 hours per week during the week ending January 3. However, commencing in February his hours were reduced, so that his average number of hours worked per week during the months of February, March, and April was 19, reaching lows during the week ending March 28 of 3 hours, and during the week ending April 4 of 8 hours. Lonnie Sartore, who had averaged approximately 27 hours per week prior to February, had his hours reduced so that his average number of hours worked per week was 9½. Spindel, who had averaged approximately 62 hours per week prior to February, had his hours reduced so that during the months of February, March, and April he worked only an average of 38 hours per week, reaching a low of 32 hours per week during the weeks ending March 7 and 14. Shanks who had averaged approximately 64 hours per week prior to February, had his hours reduced, so that

On February 21, a consent election was conducted by the Board,[8] and when the vote was announced Podeschi asked whether he could lay off 15 to 17 employees. He was advised by the Union that he should take no action until such a time when the matter could be discussed between the parties.[9]

This record further reveals and shows that on March 1 the Union sent a letter to the Respondent, in which it requested certain information concerning names of employees on the payroll at that time, the employees' hiring dates and job classifications, the employees' current rates of pay and their average number of hours worked per week for the last 3 months, benefits provided by Respondent for the employees, days and hours during which Respondent's store was open for business, the store volume of sales by month for each department, and job duties required of employees away from the store premises. On March 12 the Company sent the Union some of the requested information, and included in this was information relative to wages paid

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during the months of February, March, and April his average number of hours worked per week was approximately 41. Florence Walker, who had averaged approximately 42 hours per week prior to February, had her hours reduced, so that during the months of February, March, and April her average number of hours worked per week was 29.

8. The Union won the election by four votes and on March 4 was certified. It is noted in this regard that the certification was not challenged before the Board after the election was conducted, and that Respondent does not contend in this proceeding that the certification was invalid.

9. On February 26, the Union filed its first unfair labor charge against the Company (Case No. 14-CA-3008—General Counsel's Exhibit No. 13). At the first negotiating meeting between the parties on the next day, the Union agreed to hold this charge in abeyance, and the Company agreed there would be no further reduction in hours or in the working force, that a discharged employee would be reinstated, and that the status quo would be maintained pending further contract negotiations. Following this meeting, Cooper was reinstated and this charge was dismissed by the Board's Regional Office. The charge upon which the complaint in this case is based was filed on May 8, as aforestated.

to employees. There is no question—and it is admitted—that this information was incorrect. As far as I can ascertain, the correct information concerning wages has never been furnished to the Union.

On April 4 the second negotiation meeting was held. During this meeting, the union proposed contract (General Counsel's Exhibit No. 5) which had previously been submitted to the Respondent was discussed in detail. While discussing the recognition clause, which indicated that the Union represented part-time employees, Podeschi stated that perhaps the Union did not represent the employees, because there was still a question in his opinion as to whether the Union should be representing his people, based on the D. E.-D. O. students voting in the election, and that he had written to Washington about the matter and if the answer came back that the D. E.-D. O. students should not have voted, the Union would not be negotiating with the Respondent at all. The record shows that in discussions dealing with job classifications or departments in the store, the Union pointed out that the questionnaire it had received from many of the Respondent's employees indicated that the employees had specific job duties and generally worked in a department; i.e., grocery, meat, or carry out. However, Podeschi took the position that all the employees in his store were interchangeable and that no employee was assigned to work in any particular department. It was the Union's position that the Respondent had individuals working in the produce department, the meat department, and as carryout boys. In the Union's proposed contract a 3-year duration was also discussed, and Podeschi stated that 1 year is all he wanted because there would then be an election and then "the Union won't be here anyway." The Company refused to post a work schedule on part-time employees and nothing definite was reached on this matter. After a discussion between the parties on a lunchroom

in the store, the Company conceded that the employees could eat at the store if they received permission from Podeschi. The Union also brought up the possibility of employees getting credit for previous experience, vacation period, pregnancy leave, and layoffs, but these proposals were either turned down by the Respondent or no comment was made on them. Podeschi also flatly refused the proposed clause relative to a union shop.[10]

Another negotiating meeting between the parties was held on April 11. Podeschi again stated that when his answer from Washington came back relative to the "D. E." and "D. O." students the "whole thing" would be concluded. At this meeting the Union also requested certain information relative to the Respondent's insurance plans.[11] A Federal mediator was also present at this meeting, but no progress was made on major contentions under discussion such as the union-shop provision, department heads, and the term of the proposed contract. By April 11 the Company had not submitted any counterproposal.

Union Representative Burki testified that at the meeting on April 22, very minor progress was made, and all parties concluded that it looked like an impasse had been reached.[12] On or about April 28 or 29, a meeting was held of all the Union's members in the Taylorville area, including 21 individuals who were in the employ of Respondent, and about 30 individuals who were in the employ of other retail

10. Podeschi stated that if the employees gave him money he would remit it to the Union.

11. The information on insurance was not received until July and the Union had to renew its request for this information at each negotiation meeting. Even then, it was incomplete in that it failed to list the employees by name and the coverage which they had, as requested.

12. Burki further related that the only way the Union could make their desires known more forcefully was to discuss what had transpired at the meeting with their members—and then let them make a decision on what the Union should do.

stores in the area. During this meeting, the problems which the Union had been confronted with in its negotiations with Respondent were discussed. The members were informed that the purpose of the meeting was to tell them of the current problems in the negotiations, including a full discussion on the items of disagreement between Respondent and the Union. During this meeting, the unfair labor practice charges which had been filed with the Board on February 26, as aforestated, were read in their entirety, and each charge was explained to the members present. It was also explained that the reduction in the hours or the withdrawal of the privileges which they had previously enjoyed; *i.e.*, using the telephone, using the oil changer, grease rack, or other things, were, in the opinion of the business representatives of the Union, illegal, and that the Board would see that these things were corrected. With respect to the contract, 27 separate items were detailed, each of which was considered by the Union more than just a minor item which was a point of disagreement between the parties. Respondent's lack of cooperation in submitting the information which had been requested was also detailed for the members. After discussions on these points, all individuals present agreed that a strike vote should be taken by secret ballot. Such a vote was taken, and of the 50 individuals who voted all were in favor of the strike.

On May 2 Podeschi informed employee Spindel that whoever went out on strike could consider themselves fired unless he had a doctor's excuse, and that Podeschi was going to drop the insurance on those who went on strike. About this same time Podeschi told Garmon, Wiggs, and other employees that if they went out on strike their insurance would not be any good, and he also mentioned to Garmon that he would see that the high school boys did not get their diplomas. At midnight on May 2 employees went

out on strike against the Respondent.[13] This record further reveals that starting in May several new employees were then hired, and the Company had seven individuals as replacements on or about July 11.[14]

On May 13 another meeting took place between the parties. At this meeting one of the Respondent's negotiators was absent, and the Union was informed by the Company that the absent individual had taken the notes in prior meetings, and those who were present for the Respondent could not recall what had previously transpired. The Company again denied that there was a meat department or meat-cutters in the store, and the Union had not received the Respondent's health and welfare plan as had been promised. Among many other items there was still no agreement on union security, overtime after 32 hours, and the lunchroom. The Company had agreed on part-time holiday pay, closing hours on certain holidays, and also some agreement was reached on wages of employees, but there was never any agreement on wages for those who were department heads, Podeschi merely stated that he did not have any.[15] On June 3 the parties met again, but made little or no headway.

It was not until the July 11 meeting that the Company even deigned to make a counteroffer, some 4 months after the Union had been certified and 3 months after the first April bargaining session began.[16] In looking the proposal over the Union noticed that while there were some concessions there were also omissions in the proposal of things that had been agreed upon long before. Rest period, for example, was completely omitted.

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13. O. T. page 242.

14. General Counsel's Exhibit No. 16.

15. The timecards disclose that the Company was paying wages to several employees listed in the meat department.

16. General Counsel's Exhibit No. 7.

On July 11 the Union, at the conclusion of the negotiations taking place that day, made an unconditional offer, on behalf of the employees on strike, to return to work. At that time, Respondent advised the Union that it would consider this offer and advised the Union at a later date regarding Respondent's position with respect thereto. On or about July 13, the Respondent contacted the Union and advised that the Respondent would take back the striking employees two or three at a time on a seniority basis, and, as the economic condition of the store warranted, would call the strikers back as additional help was needed. Respondent expressed no willingness to discharge any of the seven striker replacements hired after May 2, 1963. This offer by Respondent was confirmed by a letter which was received by the Union on or about July 15.[17] In this letter, Respondent also failed to indicate that it would discharge the individuals hired as striker replacements, while agreeing to return the strikers to work on a piecemeal basis as economic conditions warranted. This offer of Respondent was not accepted and the strike continued through to the time of this hearing.[18]

On July 23 another meeting was attempted by the Federal mediator. To expedite this conference the Union prepared two lists, one, "Areas of tentative agreement" (General Counsel's Exhibit No. 10), and the other, "Items requiring further negotiation" (General Counsel's Exhibit No. 9). Review of these documents shows that of the 13 items listed as "tentatively agreed upon," only 6, pertaining to minor points, were fully acceptable (call-in pay, lunchroom, funeral leave, time off for union stewards, arbitration, and

17. General Counsel's Exhibit No. 8.

18. It is also noted that after the unconditional offer to return to work was made, the Company hired at least five additional employees, and that these individuals, together with the replacements who had been hired prior to July 11, as aforestated, were in the Respondent's employ at the time of this hearing.

Christmas and New Year's Eve closing). Several of the other items required additional modification before they could be accepted, and related to more fundamental items, such as work schedules and check off. Of the items requiring further negotiation after 3 months, there were at least 23 on which there had been no or very little agreement reached. At this meeting, however, the Union agreed that it would not hold up negotiations on the proposed clause relating to previous experience, and the parties then agreed on clauses relating to jury service, pregnancy leave, injury on the job, access to company records, and shop cards. On the balance, there were no concessions or agreements by the Company.[19]

B. Final Conclusions.

I do not think it necessary to prolong here any further detailed discussion as to the 8(a)(1) allegations of the complaint. The record is clear that after being advised of the union activities, the Company took steps to find out the strength of the Union and proceeded to ask each employee whether or not they had been contacted, and whether each had signed an authorization card. Several employees were asked if they knew who the supporters or leaders behind the union activities were, and others were requested to assist by finding out who the individuals were responsible for the union activities. Some employees, including Spindel, were repeatedly asked whether they had signed authorization cards for the Union. Certainly their interrogations and the signing of signature slips, as aforestated, showed employees that the Company felt only adverse

19. Around September 2, the Union was informally advised over the telephone by the mediator, after the amended complaint in this case had issued, that the Company would make some additional concessions, but no formal offer on these was ever received by the Union. Supposedly these concessions related to certain pay rates and status on part-time employees, overtime, seniority, and split shifts.

sentiments toward the Union. Subsequent to these events the Respondent then informed employees that many of their prior privileges were being withdrawn, as heretobefore mentioned. The employees on February 1 were also told by Podeschi that 15 jobs could be eliminated and that the store could be sold.[20] In *Blue Flash Express, Inc.*, 109 NLRB 591, the Board indicated that for a limited purpose an employer may interrogate employees, but only after safeguards are taken in the form of assurances to them that no interference or coercion is intended and that the employees have a right to do as they please. In the situation here the Company gave no safeguards whatsoever, and furthermore the interrogations clearly revealed that the Respondent was dead set against the Union, and would take whatever steps were necessary to defeat its organization attempts. So regardless of whatever initial objectives were contemplated by the Company, and whether they were legal or illegal, the subsequent implementations under these circumstances were clearly violative of the Act.

The foregoing instances that have been credited and attributed to the Respondent include unlawful interrogations to ascertain which employees signed union authorization cards, which employees started the organizational efforts for the Union, and inquiries and convassing into sentiments, attitudes, and sympathies of other employees; threats to sell the Respondent's business, to reduce hours of employment and wages, and to eliminate jobs and employees' insurance. This conduct on the part of the Company constitutes violations of Section 8(a)(1) of the Act, and I so find.[21]

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20. To illustrate these points Podeschi then told employee Sartore that his son would not be needed—with the possible exception of weekends.

21. The only witness the Company placed on the stand, other than technical witnesses, was Podeschi himself. For the most part Podeschi did not try to deny many of the 8(a)(1) allegations. Ac-

As related herein, this record establishes that long enjoyed employee benefits were also rescinded by the Company because of union activities. This is discrimination in conditions and terms of employment, and a clear violation of 8(a)(3) and (1) of the Act. The principal 8(a)(3) allegation involved here, however, is the cutting of the hours of eight employees.[22] Cooper was openly identified by Podeschi as one of the "ring leaders" in the organizational efforts for the Union and was a union observer at the election. Frank Sartore admitted to the Company that union representatives had been to his home to discuss the Union, and from these associations with the Union, Lonnie Sartore, Frank Sartore's son, was also identified with the Union. Employees Mahan, Ginger, and Shanks, were or had been under the "D. E." or "D. O." programs, and their status to participate in union activities had been continually objected to, as aforestated. Spindel, Cooper, and Shanks attended some or all of the union meetings, and some of these meetings were also attended by relatives of the Respondent's president, Podeschi. For the reasons given here and from the overall evaluation of this record, it appears clear to me that the eight discriminatees listed in the complaint were, in fact, active supporters of the Union; that the Company either had specific knowledge of their union activities or they were thought to be behind the Union; and that they all suffered sizable reductions in the number of hours they worked, immediately or shortly after the Company became aware of their union activities. As previously pointed out herein, the Company engaged in a very complete and detailed survey, investigation, and canvass on several oc-

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cordingly, this record stands unchallenged in several of these respects; and it is replete with instances of the Company's overt hostility to the Union and to the exercise by its employees of their rights under the Act.

22. The eight employees so named in the amended complaint are: Cooper, Ginger, Mahan, Reed, Lonnie Sartore, Shanks, Spindel, and Florence Walker.

casions for supporters of the Union and this also lends weight to my finding that the Respondent had knowledge.[23]

In the periods of time heretofore related—this record shows that Cooper went from 74 hours to 19 hours; Ginger was reduced from 40 to 8 hours; Mahan went from 39 hours in February to 10 hours in April; Reed from 40 to 3 and 8 hours; Lonnie Sartore from 27 to 9; Spindel from 62 to 32; Shanks from 64 to 41; and Walker from 42 hours to 29. The Respondent argues that the reduction of hours was necessary due to economic conditions.[24] The Respondent's accountant, Ribordy, testified that the Company had a sales volume high in December 1962, and that by March 1963 the volume had dropped 31 percent, and that the labor hours dropped 21 percent. Ribordy also stated that the falling off of sales volume and labor hours was also true in like periods for the years 1959, 1960, 1961, and 1962.[25] As far as I am able to ascertain, General Counsel's Exhibit No. 15 shows that there were neither separations nor any sizeable reductions in the number of hours of work for employees in the first quarter of 1962. While there were a few instances of reductions in hours from the first pay period in January 1962, in the last pay period in March 1962, most of the individuals then working for the

23, There is well-established Board and court precedent that *direct* knowledge of an employee's concerted activities is not essential for finding an 8(a)(3) violation. The Board has held that such knowledge may be inferred from the record as a whole. *Wiese Plow Welding Co., Inc.*, 123 NLRB 616.

24. The Company contended that their past history shows a decline in employment from peaks in December to lower employment hours in January, February, and March.

25. Accountant Ribordy stated that his conclusions were ascertained from General Counsel's Exhibit No. 15, which was mainly compilation in 1962 of employees' timecards, coupled with the sales ledger of the Company, and these factors and figures were the basis of his testimony—all reflected in two graphs submitted by the Respondent, and marked "Respondent's Exhibits Nos. 4 and 5."

Company enjoyed more or less constant hours of employment during this quarter of 1962.[26] It further seems to me that the two graphs submitted, as conclusionary of the Respondent's tabulations, also lack probative value in support of their contention. In preparation of the graphs, the accountant admittedly did not take into consideration the fact that the Respondent has several operations outside of the one store involved in these proceedings, and on frequent occasions individuals, while on the payroll of the store, are assigned work away from the store, and which operations produce no income for the store. Furthermore, this record shows that several of the discriminatees in this proceeding had at least some seniority in employment over at least three other employees not involved herein, and while this aspect of the case was not fully developed, it tends, in my opinion, to add some additional support to the General Counsel's case. It is also interesting to note that several employees who were not at least directly involved with union efforts, or who did not go out on strike — Perry Corogill, Shirley McArdel, Coady, *et al.*—all retained constant hours of work each week, and in one or two instances their initial employment was dated subsequent to the employment of Spindel, Shanks, Mahan, and Cooper.

In accordance with the above, I find that the Respondent selected and then reduced the hours of employment of the eight discriminatees named herein because of their union activities, and was, therefore, violative of Section 8(a)(3) of the Act.

The statutory duty to bargain collectively imposes the obligation to meet and "confer in good faith" with a view to the final negotiation and execution of an agreement. Section 8(d) of the Act. To be sure, the Act "does not

26. The exhibits in this record do not contain employees' timecards for the years prior to 1962.

require either party to agree to a proposal or require the making of a concession" (*N.L.R.B.* v. *National Shoes, Inc., and National Syracuse Corporation,* 208 F. 2d 688, 691 (C. A. 2)). On the other hand, there is no question that "surface bargaining" (*N.L.R.B.* v. *Whittier Mills Company,* 111 F. 2d 474, 478 (C. A. 5)), or an employer's "failure to do little more than reject [union demands]" is "indicative of a failure to comply with [the] statutory requirement to bargain in good faith." *N.L.R.B.* v. *Century Cement Mfg. Co., Inc.,* 208 F. 2d 84, 86 (C.A. 2). "Collective bargaining, then, is not simply an occasion for purely formal meetings between management and labor, in which each maintains an attitude of 'take it or leave it'; it presupposes a desire to reach ultimate agreement to enter into a collective bargaining contract." *N.L.R.B.* v. *Insurance Agents' International Union, AFL-CIO (Prudential Insurance Co.),* 361 U. S. 477, 485. In accordance with these general principles as applied to the factual circumstances and events in this case, I find that the Respondent's whole course of dealing with the Union clearly demonstrates that it is engaged in mere surface bargaining. In so finding, I rely particularly on the following evidence of the Respondent's bad faith:

To begin with, it appears to me that the Company did not come to the bargaining table with a sincere resolve to enter into a meaningful relationship with the Union. It came with but one fixed idea—get the Union out of the store. It came fresh from discriminatorily cutting hours of its employees, fresh from rescinding several company benefits enjoyed by the employees, purely as a retaliation for their union activities; employees had been interrogated as to union sympathies, threatened with pay cuts, and the son of one employee told he was no longer needed. This was the atmosphere within which the Company opened its bargaining, and any doubt that it intended to

continue its antiunion purpose was quickly dispelled by its refusal to do anything but stall and delay.

This record shows that on March 1 the Union requested various information from the Company. In reply the Company admittedly furnished incorrect information on current wages paid to employees, and subsequent to the discovery of the error never corrected the mistake by an official written communication to the Union.[27] At the meeting on April 4, Podeschi informed those present that perhaps the Union did not represent the employees because "D.O." and "D.E." individuals had voted. As the credited testimony shows, this was constant needling on the part of the Respondent. This issue had been settled by the parties in their agreement to the consent election on February 21, and, therefore, the continual harassment on the matter was not an expression of any bona fide doubt as to the Union's majority status, but rather, this objection persisted because the Respondent was opposed to any bargaining at all. Likewise, the Respondent's position that once word was received from Washington on the high school people, the Union would no longer be representing the employees, is reminiscent of the tactics denounced in *N.L.R.B.* v. *International Furniture Company,* 212 F. 2d 431, 422 (C. A. 5), where the employer attempted to press the bargaining process out until the end of the certification year when the union majority status could be challenged. In addition, I find that no genuine impasse was reached on April 22, in view of the Respondent's bad-

27. To be sure, the Union had no difficulty in eliciting promises to supply information—company representatives assured the Union that certain data was in preparation—but to obtain complete and adequate information in sufficient time to be of use at the bargaining table was quite another matter. The employee benefits asked for (insurance and welfare plans in usable form) were not provided until months later. Such tactics are inconsistent with the obligation to supply the Union with proper information without undue delay.

faith bargaining as revealed by its entire course of conduct during the negotiations.

It is also noted here that at the May 13 meeting the Union was informed that one of the Respondent's negotiators was absent—and that he was the one who had taken the notes on the prior meetings, as aforestated, and as a result the Union had to start the discussions all over again. The Respondent in this incident clearly displayed a dilatory attitude and reluctance to bargain in good faith. It is further noted that it was not until July 11, some 4 months after the Union was certified, when the Company first submitted a counterproposal, and some 2 months after the employees had gone out on strike. Moreover, Respondent's counterproposal made no mention of some items the parties had agreed to long before. Again dilatory tactics.

This record shows that up to July 23—5 months after the election—there were still 23 items on which there had been no or very little agreement reached. About this time the Union receded further and further from its original demands, and progressively reduced or revised a great number of its initial requests in an attempt to reconcile differences and reach ultimate agreement. It appears clear to me that those agreements which were made were solely by reason of the Union's acceptance of the Respondent's proposal as it stood. Likewise, this finding cannot be discounted because the Company subsequently made some minor concessions to give the appearances of bargaining, and while eventually there were apparently some concessions made, it is clear to me that there was no real intent on the Respondent's part to reach an agreement.[28]

In sum, the conditions which the Company imposed on

28. These concessions were mainly on items about which there was little, if any, real disagreement between the parties, and in many instances it was the Union who made the concession.

bargaining, including the unabated discriminatory hour cutting, threats to discharge employees who dared consider going on strike, the statement by Podeschi on May 2 that he would see to it that the high school employees would not get their diplomas, and a threat that insurance benefits of those thinking of striking would be taken away, contribute strong supporting evidence to my findings here, and is further evidence of the Respondent's bad faith.

The last phase of this case deals with the contention by the Company to the effect that the strike on May 2 was called only for economic reasons. The evidence clearly indicates that Respondent had engaged in bad-faith bargaining with the Union, and had made certain other reprisals against its employees because of their union activities. And after a union meeting, as outlined in an earlier section herein, during which Respondent's conduct was fully detailed and explained, and during which the union representatives detailed for those present all the "unfair labor practices" which Respondent had committed and was continuing to commit, a strike vote was taken. Clearly, the strike action taken as a result of the vote at this meeting was in protest of Respondent's unfair labor practice conduct and was substantially motivated by such factors, and in accordance therewith I so find.[29] Under established law the unfair labor practice strikers were entitled to reinstatement to their jobs upon unconditional application, and regardless of whether or not they had been replaced. As aforestated, the employees—through the Union—made their unconditional offer to return to work on July 11. I further find that the requirement of the Company to the effect that strikers would be called

29. While it may be argued that the strike, in part, was for some economic motivations, the record, on the whole, as indicated above, establishes that the strikers were unfair labor practice strikers.

back two or three at a time as economic conditions warranted—with no willingness to discharge any of the replacements hired after May 2—also constituted discrimination in violation of Section 8(a)(3) of the Act. It is well settled that the imposition of such a condition on returning unfair labor practice strikers is unlawful.

IV. The Effect of the Unfair Labor Practices Upon Commerce.

The activities of the Company set forth in section III, above, occurring in connection with the operations of the Company described in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy.

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action which I find necessary to effectuate the policies of the Act.

I shall recommend that the Respondent offer employees James Cooper, William Ginger, Richard Mahan, Kenneth Reed, Lonnie Sartore, Charles Shanks, Don Spindel, and Florence Walker, and all the other unfair labor practice strikers immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, discharging, if necessary, any replacements in order to provide work for such strikers. I shall also recommend that the Respondent reimburse the foregoing employees for any loss of pay they may have suffered by reason of the Respondent's discrimination against them, by paying to

each of these employees a sum of money equal to the amount that he normally would have earned as wages from the date of his unconditional application for reinstatement to the date of the Respondent's offer of reinstatement, less his net earnings during said period. The amount of backpay due shall be computed according to Board policy set forth in *F. W. Woolworth Company*, 90 NLRB 289. Payroll and other records in possession of the Respondent are to be made available to the Board, or its agents to assist in such computation and in determining the right to reinstatement. Interests on backpay shall be computed in the manner set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716. It is also recommended that the eight employees specifically named above be made whole by paying each a sum equal to that which he would have earned since February 1, 1963, to May 2, 1963, absent the discrimination against him, less his net earnings during said period.

Having also found that the Respondent has unlawfully refused to recognize or to bargain with the Union as the representative of employees in an appropriate unit, it will be recommended that the Respondent be required, upon request, to extend recognition to and to bargain with the Union.

It will be further recommended, in view of the nature of the unfair labor practices the Respondent has engaged in, that it cease and desist from infringing in any manner upon the rights guaranteed employees by Section 7 of the Act.

Upon the basis of the foregoing findings of fact, and upon the entire record in the case, I make the following:

Conclusions of Law.

1. The Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By discriminating in regard to the hire and tenure of employment of the foregoing named employees, thereby discouraging membership in a labor organization, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

5. All employees of Respondent's store located in Taylorville, Illinois, including part-time employees, excluding the store manager, all guards, professional employees, and supervisors as defined in the Act, constitute, and have at all times material to this proceeding constituted, a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

6. By refusing to bargain collectively in good faith with the Union as the exclusive representative of the employees in the aforesaid appropriate unit, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]